

A **CB LAND SDN BHD v. SYARIKAT PERUMAHAN NEGARA BHD**

HIGH COURT MALAYA, KUALA LUMPUR

MARY LIM J

[CIVIL SUIT NO: 22C-34-06-2014]

30 JUNE 2015

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CONTRACT: *Indemnity – Construction of – Development agreement and general conditions of contract – Development of housing project within stipulated time – Application for extension of time for completion date – Late payment of delivery charges to affected purchasers upon delivery of vacant possession – Claim for indemnity of late delivery charge – Reasons for delay – Whether defendant could be indemnified by plaintiff – Contracts Act 1950, s. 77*

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The relationship between the parties arose from three documents *ie* (i) a development agreement dated 2 March 2007 ('DA'); (ii) a letter of acceptance dated 13 July 2007 ('LOA'); and (iii) a general conditions of contract ('GCC'). Under the DA, the defendant appointed the plaintiff to design and build, amongst others, a mixed development of affordable homes ('the said project'). The total value of the said project was RM64,473,174.92. The original completion date of the said project was 5 August 2010. This date was, however, extended to 21 March 2011 and subsequently to 17 May 2012 on applications by the plaintiff. Two certificates of delay and extensions of time pursuant to cl. 45.1 of the GCC were issued by the defendant. A Certificate of Practical Completion ('CPC') was later issued on 30 November 2012 certifying that the said project was satisfactorily completed on 16 May 2012. On 22 May 2012, Majlis Bandaraya Shah Alam issued a certificate of fitness for occupation ('CFO'). Under cl. 10.12 of the DA, the said project was deemed completed upon the issuance of the CFO. The defendant subsequently delivered vacant possession of the units to the purchasers on 25 June 2012. At the same time, the defendant paid a total sum of RM1,987,836.09 as late delivery charges ('LAD') to the affected purchasers. Therefore, the defendant sought to be indemnified by the plaintiff for these payments pursuant to cl. 10.12 of the DA. On 17 October 2012, the plaintiff issued a certificate for penultimate payment through interim payment for the sum of RM4,599,864.80. Relying on cl. 50 of the GCC, the defendant deducted RM1,987,836.09 from the payment due to the plaintiff and made part payments of RM1,599,864.80 and RM1,012,163.91 respectively to the plaintiff without prejudice to its rights and interests under cl. 10.12 of the DA and subject to the plaintiff's undertaking to indemnify the defendant's loss of RM1,987,836.09. On the other hand, the plaintiff maintained that the defendant had agreed that no LAD would be imposed when the extensions were granted. In any case, the plaintiff argued that the defendant was the cause of the delay in completion, as such, the plaintiff was entitled to the payment of RM1,987,836.09. The issue for determination was whether the plaintiff had to indemnify the defendant for late delivery charges of the amount of RM1,987,836.09.

Held (allowing plaintiff's claim with costs; dismissing defendant's counter claim): A

- (1) The plaintiff's applications for extensions of time were made under the GCC and not the DA. That however, did not mean that the plaintiff was in breach of the DA such as to disentitle the plaintiff to the present claim. By its conduct, the defendant must be taken to have agreed and accepted that the completion date of the DA had been extended by virtue of the extension. The parties had intended that the DA and the GCC be read as a single document. There could not be an extension of the completion date for the purpose of the GCC, but none for the purpose of the DA. Hence, the defendant's reference to cl. 10.12 of the DA inferred that the term and conditions of the DA were also under consideration. That would include an extension of time under the DA. Hence, the defendant had in effect waived all rights to damages, including LAD. (paras 57 & 60) B C
- (2) The delay that led to the eventual loss was occasioned by the defendant itself. In such a case, the rules of equity and of statute law as provided under s. 77 of the Contracts Act 1950 do not allow for the claim to be indemnified. In order to be indemnified, the defendant must prove that the loss for which it is claiming was not caused by its own conduct but by that of the plaintiff or by some third party. To realise that right to be indemnified, the defendant had to prove its claim. The fact of payment to the purchasers in late delivery charges was merely evidence of payment to some claims; the question of culpability or liability to pay must still be proved. (paras 63 & 64) D E
- (3) The plaintiff had shown that the delay was not due to the plaintiff's fault but was caused by the defendant. In such a case, the defendant was not entitled to invoke and enforce cl. 10.12 of the DA. This clause read with s. 77 of the Contracts Act 1950 was intended to apply where the plaintiff was at fault and not otherwise. If that were not the case, a defendant could simply delay delivery of possession to the purchasers for whatever reason even if the plaintiff had delivered by the original date of completion and yet have to pay for such late delivery charges. Since time for completion had been extended, the right to be indemnified was no longer available. (para 70) F G
- (4) Insofar as the letters of undertaking were concerned, the court did not find that there have been agreements which were unequivocal and of the meaning suggested by the defendant. From the correspondence, there was no agreement by the plaintiff that it agreed to indemnify the defendant. With that, there could be no admission, no reliance and no issue of estoppel. Under such circumstances, the plaintiff was entitled to its monies. (paras 78, 85, 92 & 93) H I

- A Case(s) referred to:**
Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC (refd)
Malayan Banking Bhd v. Basarudin Ahmad Khan [2004] 4 CLJ 596 CA (refd)
Sime Hok Sdn Bhd v. Soh Poh Sheng [2013] 2 CLJ 615 FC (refd)
South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC (refd)
- B Legislation referred to:**
Contracts Act 1950, s. 77
Rules of Court 2012, O. 18 r. 12
- C** *For the plaintiff - Yip Fook Thai (Ch'ng Hun Yao with him); M/s Yip & Co*
For the defendant - Jagjit Kaur Ujagar Singh; M/s Sidek Teoh Wong & Dennis
Reported by S Kahvitha

JUDGMENT

- D Mary Lim J:**

The Claim

- E** [1] All the documents relied on by the parties are to be found in two volumes marked as CBD1 and 2. These documents are all agreed in terms of authenticity and contents; what is generally understood as “Part A” type of documents.
- F** [2] The relationship between the parties can be discerned from three of those documents: a development agreement dated 2 March 2007 (DA), a letter of acceptance dated 13 July 2007 (LOA), and general conditions of contract (GCC). Under the DA, the defendant appointed the plaintiff to design and build amongst others, a mixed development of affordable homes on Grant 30437 Lot 13824 and Grant 30238 Lot 13825 for Phases 1 and 2 Section 22, Shah Alam, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan (the said project). In Phase 1, there were 372 units of medium cost apartments (type A), 57 units of medium cost apartments (type B), four units of medium cost apartment (type C), two units of medium cost apartments (type D) and nine units of shops. The total value of the said project was RM64,473,174.92.
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- H** [3] After the plaintiff had commenced work on the said project, the value of the contract was revised through a letter of revision and a deed of variation.
- I** [4] The original completion date of the said project was 5 August 2010. This date was however, extended twice on applications by the plaintiff. First, to the 21 March 2011 and subsequently to 17 May 2012. Two certificates of delay and extensions of time pursuant to cl. 45.1 of the GCC

were issued by the defendant. A certificate of practical completion (CPC) was later issued on 30 November 2012 certifying that the whole of the development works, that is, the said project was satisfactorily completed on 16 May 2012. On 22 May 2012, the local authority, Majlis Bandaraya Shah Alam issued the certificate of fitness for occupation (CFO). Under cl. 10.11.2 of the DA, the development project is deemed completed upon the issuance of the CFO by the relevant authorities.

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[5] The defendant delivered vacant possession of the various units to the respective purchasers on 25 June 2012. At the same time, the defendant paid a total sum of RM1,987,836.09 as late delivery charges to the affected purchasers. The defendant seeks to be indemnified by the plaintiff for these payments pursuant to cl. 10.12 of the DA.

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[6] In the course of the execution of the works, the plaintiff made 29 claims which were certified and duly paid by the defendant. On 17 October 2012, the plaintiff issued certificate for penultimate payment through Interim Payment No. 30. The amount due was RM4,599,864.80.

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[7] The defendant made part payments leaving a sum of RM1,987,836.09 as outstanding. *Vide* letter dated 30 November 2012, the defendant made the payment of RM1,599,864.80 “without prejudice” to its rights and interests under cl. 10.12 of the DA and subject to the plaintiff’s undertaking to indemnify the defendant’s loss of RM1,987,836.09. *Vide* “Akuan Persetujuan dan Penerimaan” dated 3 December 2012, the plaintiff is said to have consented and agreed to accept that payment on the defendant’s terms.

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[8] The defendant further claimed that *vide* letter dated 6 December 2012 the plaintiff agreed to indemnify the defendant under cl. 10.12 of the DA for the late payment charges (LAD) of the sum of RM1,987,836.09 that the defendant paid to the respective purchasers. The defendant claimed that it was on the strength of the plaintiff’s undertaking that it paid a further sum of RM1,012,163.91 to the plaintiff.

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Issue

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[9] The single issue agreed for determination is this:

Whether or not the Plaintiff has to indemnify the Defendant for late delivery charges [LAD] of the amount of RM1,987,836.09?

[10] The plaintiff’s case is that the plaintiff is under no obligation to indemnify the defendant. Any delay encountered in the course of the execution and progress of the works has been accounted for; and any right to be indemnified has been waived. That waiver is in no way altered by the plaintiff’s letter of 6 December 2012.

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[11] The plaintiff claimed a careful reading of these letters indicate that the plaintiff had always maintained that it was not liable for any LAD; that in fact there would be no LAD imposed; that the claim was now *mala fides*; that

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A the undertaking was conditional and/or subject to the terms of the contract as a whole; and that there was no concluded or finalised agreement between the parties.

B [12] The plaintiff also pleaded in the alternative that even if the plaintiff's letter of 6 December 2012 amounted to an undertaking, it was procured under duress by the defendant calling on the bank guarantee or performance bond of RM3,260,091 – see para. 7 of the reply to defence and defence to counterclaim filed by the plaintiff. No further details of the allegation of duress were pleaded.

C [13] The defendant on the other hand maintained that the plaintiff was not entitled to the release of the sum of RM1,987,836.09 sum by virtue of cl. 10.12 of the DA. The defendant claimed that the original completion date of the DA was 36 months from the commencement date, that is, by 5 August 2010. Quite aside from there being no applications for extensions of time for completion under the DA, the defendant claimed that the plaintiff completed the said project 651 days late; and this was after two extensions of time had been granted under cl. 45 of the GCC but not, under the DA. The defendant claimed that by reason of the delayed or late completion by the plaintiff, the defendant was obliged to pay the purchasers of the various units a total sum of RM1,987,836.09 as late delivery charges. The defendant claimed that it was entitled to be indemnified by the plaintiff for this sum under cl. 10.12. Relying on cl. 50 of the GCC, the defendant had in fact already deducted this sum from the payments due to the plaintiff.

F [14] It was the defendant's claim that it had never waived its right to be indemnified when it twice extended the completion dates for the said project. In fact, the defendant had advised the plaintiff of the outstanding late delivery charges under cl. 10.12 at each material time. While the defendant may have paid the plaintiff the sum of RM1,599,864.80 on 30 November 2012 and RM1,012,163.91 on 15 March 2013, these payments were without prejudice to the defendant's rights under cl. 10.12; and on the basis of the plaintiff's undertaking to indemnify the defendant the sum of RM1,987,836.09 (letter dated 6 December 2012 though referred to as 6 December 2013 in pleadings; as well as the exchange of correspondence between parties at the material time – the defendant's letter dated 3 December 2012 and plaintiff's two letters dated 6 December 2012 at pp. 382, 386 and 387 respectively). The defendant claimed that it had never waived its rights under cl. 10.12; and that the plaintiff was estopped from reneging on its promise to indemnify. The defendant counterclaimed for the indemnity.

Testimonies

I [15] The plaintiff called two witnesses while the defendant's legal adviser took to the stand. I shall deal with the issue from the construction of the DA, GCC and LOA first before dealing with the letter of undertaking.

[16] The plaintiff's first witness was Za'azlin bin Ab Maulud (PW1). He was the plaintiff's project manager. He was involved from the inception of the DA to the completion of the said project; and was therefore able to testify from his own personal knowledge of the matters in dispute. He testified that there was no delay in the completion of the said project once the original completion dates were extended. As agreed, the said project was completed on 16 May 2012 when the certificate of practical completion (CPC) and the certificate of fitness for occupation (CFO) were issued on 22 May 2012 and 30 November 2012 respectively. This was consistent with the terms found in the GCC.

[17] PW1 testified that when the defendant agreed to these time extensions, and also to payments pursuant to interim payment certificates numbers 30 and 31, the defendant had also "agreed to proceed with interim payment of certificate no. 30 and 31 without any LAD issue".

[18] PW2 was Ali Akbar bin Bakar. He is the plaintiff's executive director. His testimony was confined to very narrow matters. PW2 told the court of a meeting between the parties that he personally attended. The outcome and/or agreement that had taken place at that meeting is said to have been recorded in his letter found at p. 309 of CBD2:

Our Ref: 338/BATU TIGA/CTP/ssam/12/1733

Date : 13th June 2012

SYARIKAT PERUMAHAN NEGARA BERHAD
Tingkat 8, Wisma PERKESO
Jalan Tun Razak
50400 Kuala Lumpur

Attention : Encik Maszirul Arlinza Bin Awalludin
Ketua Bahagian Operasi

En. Wan Azlan Bin Ab. Rahman
Assistant General Manager

Sirs,

CADANGAN MEMBINA (FASA 1) 2 BLOK PANGSAPURI KOS SEDERHANA TINGGI 15 TINGKAT DENGAN 2 TINGKAT RUANG TEMPAT LETAK KERETA DI BAWAH DAN 1 TINGKAT RUANG TEMPAT LETAK KERETA SEPARA BASEMEN BAWAH TANAH, YANG MENGANDUNGI 435 UNIT KEDIAMAN : 372 UNIT JENIS A, 57 UNIT JENIS B, 4 UNIT JENIS C, 2 UNIT JENIS D SERTA : 1 UNIT SURAU, 1 UNIT DEWAN SERBAGUNA, 1 UNIT PONDOK PENGAWAL, 6 UNIT KEDAI, 1 UNIT KAFETERIA, 1 UNIT TADIKA, 1 UNIT BILIK BACAAN, 1 UNIT BILIK DOBI, 1 UNIT KOLAM RENANG, 1 UNIT GELANGGANG BADMINTON, 2 UNIT PENCAWANG ELEKTRIKAL, 1 UNIT KEBUK SAMPAH, 7 UNIT TEMPAT LETAK MOTORSIKAL BERBUMBUNG DAN 1 UNIT PERHENTIAN BAS / TEKSI DI ATAS NO. 6 (SEBAHAGIAN LOT 13824 & 13825) JALAN BUDIMAN 22/3, SEKSYEN 22, 40300 SHAH

A ALAM, SELANGOR DARUL EHSAN UNTUK TETUAN CB LAND SDN BHD

- Term and Condition to Release Vacant Possession Certificate (Batu Tiga, Alam Prima, Shah Alam)

B Refer to our meeting with present of SPNB representative Dato' Dr. Sr. kamarul, En. Maszirul, En. Wan Azlan and CB Land representative Dato' Paduka Ali, Mr. Eric Yong and Mr. TP Chuah dated 12th June 2012 and write to record that our term and condition to release the Vacant Possession certificate as below:

C 1. SPNB has agreed to approve our Extension of Time No. 1 ref: SPNB/1170/A1-1895/11 dated 18th March 2011 and SPNB mentioned is subject to submit the M&E Consultant Certificate to certify.

2. SPNB has agreed to proceed the Interim Payment No. 30 & No. 31 without any L.A.D issues (as per item No. 1).

D 3. SPNB is in progress to approve our Extension of Time No. 2 and requested recommendation from professional architect and relevant consultant.

4. SPNB is in progress to approve our Variation Order and requested to submit all new Variation Order which to comply Certificate of Fitness requirement and CB Land require to submit proof record of documentation.

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We, CB Land should be entitled for all above item mentioned and we have no objection to release the vacant Possession certificate as part of the condition.

F We trust the above mentioned is clear and in order.

Thank you.

Yours faithfully,

-sgd -

G DATO' PADUKA ALI AKBAR BIN BAHAR
Director

cc Dato' Prof. Dr. Sr. Kamarul Rashdan Bin Salleh, Managing Director,
SPNB

H [19] According to PW2, the LAD which is mentioned at the second paragraph of this letter referred to the "alleged delay by the plaintiff and the damages paid by the defendant thereof to its purchasers". This means that the defendant had decided to extend time for completion of the works and to pay the plaintiff its interim payments without any LAD imposed. That "LAD" referred to the late delivery charges in cl. 10.12.

I [20] PW1 also alluded to this letter in his evidence. He gave a similar view. It was also PW1's testimony that the defendant refused to pay the plaintiff on the ground that it was entitled to be indemnified by the plaintiff under cl. 10.12. However, the parties finally agreed to non-imposition of the LAD as seen in this letter.

[21] Basically, both of the plaintiff's witnesses testified on their understanding of "LAD". Both of them maintained that the defendant had waived any imposition of LAD when extensions of time for completion of the works were granted to the plaintiff. That "LAD" was not only the LAD imposed under the GCC but the late delivery charges payable to the house purchasers under the DA, specifically under cl. 10.12.

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[22] Mohamad Hafidz bin Abu Bakar (DW1) testified for the defendant. He is the defendant's senior legal executive and he was personally involved in the matter. He testified that the plaintiff completed Phase 1 of the said project on 17 May 2012. According to him, that was a delay of 650 days as the DA had provided for the completion to be on 5 August 2010. He confirmed the two extensions that the defendant granted the plaintiff. As a matter of practice, the defendant consulted with its consultants' views on whether extensions of time ought to be granted. He said that "it is almost always the case where the defendant (SPNB) would follow the consultant's recommendation". Based on these recommendations, the defendant approved the plaintiff's applications for extensions of time to complete the said project under cl. 45.1 of the GCC.

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[23] According to DW1, the defendant did not impose any LAD as both extensions were granted under cl. 45.1 of the GCC. Pursuant to cl. 42.2 of the GCC, the defendant was "not entitled to such damages". He was however, of the view that the defendant was entitled to damages under cl. 10.12 of the DA; that is damages for the late payment charges that the defendant had to pay the house purchasers for the late completion and delivery of the units purchases in Phase 1. The amount paid to the purchasers is the amount presently claimed by the plaintiff. That amount has also been confirmed by the plaintiff.

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[24] DW1 testified that the defendant's rights under cl. 10.12 have never been waived. On the contrary, "the defendant had at all material time insisted on the due compliance of the plaintiff's contractual obligation to indemnify the defendant pursuant to cl. 10.12 of the development agreement ...".

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[25] He next referred to the defendant's letters dated 10 September 2012 (p. 380 of CBD 1) and 15 October 2012 (p. 381 of CBD 1). In those letters, the defendant claimed that it had put the plaintiff to notice of its obligation to indemnify under cl. 10.12 and the estimated amount of such late payment charges. The plaintiff never sought for a waiver of these payments as reflected in the plaintiff's letter of undertaking dated 6 December 2012 (which I shall deal with later); and its "Akuan Persetujuan & Penerimaan" to the time extensions.

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[26] In those circumstances, the defendant submits that the plaintiff had not only acknowledged but agreed to pay for the late delivery charges. Hence, the issue must be answered in the defendant's favour.

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A Findings And Determination

[27] Undisputedly, both the DA and the GCC contain terms dealing with the issues of completion, non-completion by the completion date; as well as the issue of extensions of time.

B [28] Under the DA, which is an agreement to design and build this mixed development project, the parties had envisaged that the development project was to be completed within 36 months from the commencement date. This can be found in cl. 10.9 which states:

10.9 COMPLETION DATE

C 10.9.1 The Design and Build Contractor shall complete the construction of the Development Project Works by the Completion Date for Development Project ...

[29] “Completion date for development project” is defined in cl. 1 of the DA. It means:

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- (a) for Phase 1, the date which falls within thirty six (36) months from the commencement date for Phase 1: and
 - (b) for Phase 2, the date which falls within thirty six (36) months from the commencement date for Phase 2.

E [30] “Commencement date” is also defined in cl. 1:

- (a) for Phase 1, the date of commencement of the construction works for Phase 1 from the date of receipt of the notice of possession of site by the design and build contractor from SPNB as specified in the letter of award and in accordance with the contract document;

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- (b) for Phase 2, the date which falls not later than six (6) months from the commencement date for Phase 1 as per para. (a) above.

[31] Under cl. 41 of the GCC, the contract which deals specifically with the construction aspect of the parties’ relationship, the parties have also provided for the completion of the works as follow:

G 41. Completion of the Works

41.1 Subject to any requirement as to the completion of any section or part of the Works under Clauses 39.3 and 43 before the completion of the whole of the Works, the Contractor shall complete the whole of the Works on or before the ‘Date of Completion’ stated in Appendix 1 or such extended time as may be allowed under Clause 45 hereof.

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41.2 When the whole of the Works have reached practical completion according to the provisions of this Contract and to the satisfaction of the P.D., the date of such completion shall be certified by him and such date shall be the date of the commencement of the

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Defects Liability Period as provided in Clause 48 hereof. The certificate issued under this sub-clause shall be referred to as the 'Certificate of Practical Completion'.

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41.3 Notwithstanding the provision of Clauses 42 and 45, time shall be the essence of this Contract.

[32] Appendix 1 of the GCC provided for the "completion date for development project" for Phase 1 – "to construct and complete Phase 1 and obtain the certificate of fitness for occupation within thirty six (36) months from the date of site possession of the said land. Both parties hereby agree that the actual date of the site possession of Phase 1 was determined on 6 August 2007 and the construction for Phase 1 shall be completed by 5 August 2010. However, the construction of Phase 1 has yet to be completed and pending the extension of time to be granted subject to the contract document and SPNB's sole discretion".

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[33] From the evidence and from my examination of the two primary contract documents, the commencement date and the completion date under both the DA and the GCC was in fact, the same. Both documents required the said project to be completed ultimately by 5 August 2010. This makes commercial and practical sense as the two contracts are not only inter related but have always been intended to be read as a single document and thereby, contract. In fact, cl. 37 of the DA provides specifically for this.

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[34] Both documents also provided for the event of delay and that the completion date may be extended. Under both cl. 10.9 of the DA and cl. 45.1 of the GCC, the parties have further provided for matters relating to extension of time although the reasons for seeking and/or granting the extensions may differ somewhat.

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[35] Under cl. 10.9.1 read together with cl. 10.9.2 of the DA, the parties had agreed that the completion date may be extended in the following manner:

10.9.1 The Design and Build Contractor shall complete the construction of the Development Project Works by the Completion Date for Development Project and save and except as provided herein no extension whatsoever to the Completion Date for Development Project shall be allowed unless in the reasonable opinion of SPNB that the Completion Date for Development Project is likely to be or has been delayed for any of the following reasons:

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(i) by an Event of Force *Majeure*; or

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(ii) by reason of local combination of workmen strike or lockout affecting any of the trades employed upon the Development Project Works or any of the trades engaged in the preparation, manufacture or transportation of any of the goods or materials for the Development Project Works; or

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(iii) any delay on the part of the public utility authorities in connection with the approval, relocation, installation and commissioning of utility services which cause delay to the completion of the Development Project Works; or

- A (iv) the cessation of work as directed by SPNB as a result of the discovery of antiquities which exceeds seven (7) days as referred to in Clause 10.8.

- 10.9.2 Upon the occurrences of any of the events described in Clause 10.9.1 the Design and Build Contractor shall notify SPNB of the same who shall upon receipt of such notice and is of the reasonable opinion that the event or events as described in the aforesaid notice existing, grant to the Design and Build Contractor an extension of time to the Completion Date for Development Project or such further or other extension or extensions of time beyond any extension of time earlier or previously granted if any events for which the extension was earlier or previously granted shall in the reasonable opinion of SPNB still exist or if other event or events (other than the event or events for which the extension was granted) occur or exist PROVIDED ALWAYS that the Design and Build Contractor shall constantly use its best endeavours to prevent delay and shall do all that may reasonably be required to proceed with the Development Project Works and to complete the same within the Completion Date for Development Project and/or the Extension Period of Completion Date, as the case may be.
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- [36] It is quite clear that even under the DA, a delay is envisaged and the completion date may be changed. This is despite what would appear to be quite strict and emphatic language used in cl. 10.9.1 that the plaintiff “shall complete the construction of the development project works by the completion date for development project”. Clause 10.9.1 clearly envisages that the completion dates may be extended when the defendant is of “the reasonable opinion ... that the completion date for development project is clearly to be or has been delayed” for any of the reasons found in cl. 10.9.1 (i) to (iv). In fact, time may even be extended post event of delay.
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[37] The GCC also provides for extensions of time under cl. 45.1:

- 45.1 Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the causes of delay to the P.D. and if in the opinion of the officer named in Appendix 1 the completion of the Works is likely to be delayed or has been delayed beyond the Date for Completion stated in Appendix 1 or beyond any extended Date for Completion previously fixed under this Clause:
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- H (a) by an occurrence of force *majeure* not within the control of the party affected, which that party is unable to prevent, avoid or remove, and shall mean
- (i) war, hostilities (whether declared or not), invasion, act of foreign enemies, rebellion, revolution, insurrection, military or usurped power, civil war, terrorism;
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- (ii) ionizing, radiation or contamination by radioactivity from any nuclear waste, from the combustion of nuclear fuel, radioactive toxic explosive, nuclear assembly or nuclear component thereof;

- (iii) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; A
- (iv) natural catastrophe including but not limited to earthquakes, floods subsidence, lightning and exceptionally inclement weather; and
- (v) riot and disorder, criminal damage, sabotage, strike, lockout, labour unrest or other industrial disturbances (affecting the performance of this Contract) which are not the fault of the Contractor or of any sub-contractor; or B
- (b) by reason of directions given by the P.D., consequential upon disputes with neighbouring owners provided the same is not due to any act, negligence or default of the Contractor or any sub-contractor; or C
- (c) by reason of loss or damage occasioned by any one or more of the contingencies referred to in Clause 2.7.2 hereof (provided and to the extent that the same is not due to any act, negligence, default or breach of contract by the Contractor or any sub-contractor, whether in failing to take reasonable steps to protect the Works or otherwise); or D
- (d) by reason of P.D.'s instructions issued under Clauses 7.3.1(c), 8.4(b), 14.2, 27.2, 39.6 hereof, provided that such instructions are not issued due to any default or breach of contract by the Contractor or any sub-contractor; or E
- (e) by reason of the Contractor not having received in due time necessary instructions, decisions, information, concurrence or consent from the P.D. which the P.D. is obliged to provide or give under the Contract for which the Contractor shall have specifically applied in writing on a date which having regard to the Date for Completion stated in Appendix 1 or to any extension of time then fixed under this Clause, was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for the Contractor to receive the same, or F G
- (f) by delay in receipt of any necessary permission or approval of any statutory body or local authority which the Contractor has taken all practicable steps to avoid or reduce; or
- (g) by reason of delay in giving possession of the Site as provided under Clause 39.4 and/or 39.5 hereof; or H
- (h) by delay on the part of artists, tradesmen or others engaged by the Government in executing work not forming part of this Contract; or
- (i) by the Contractor's inability for reason beyond his control and which he could not reasonably have foreseen at the date of closing of tender of this Contract to secure such goods, materials and/or services as are essential to the proper carrying out of the Works, I

- A then the P.D. shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing a fair and reasonable extension of time for completion of the Works, provided always that the Contractor shall use constantly his best endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the P.D. to proceed with the
- B Works. The certificate issued by the P.D. under this Clause shall be referred to as the 'Certificate of Delay and Extension of Time'.

[38] The point to make about these two provisions is that both documents recognise that the completion date may be extended; and that applications for extensions of time may be dealt with even later, after the event, and not necessarily before. The difference however, is that unlike cl. 10.9.1, cl. 45 read with cl. 42 provides that where there is an extension of time under cl. 45.1, there is a corresponding right to impose LAD under cl. 42.1:

42. Damages for Non-completion

- D 42.1 If the Contractor fails to complete the Works by the 'Date for Completion' stated in Appendix 1 or within any extended time under Clause 45 hereof, the Contractor shall pay the Government a sum calculated at the rate stated in Appendix 1 as Liquidated and Ascertained Damages for the period during which the said Works shall so remain and have remained
- E incomplete and the P.D. may deduct such damages from any money due to the Contractor under this Contract and failing which such damages shall be recovered from the Performance Bond or as a debt due from the Contractor, and the P.D. shall inform the Contractor in writing of such deduction.

- F [39] There is no equivalent provision within cl. 10.9.2 or anywhere else in the DA that corresponds to cl. 42.1; save for cl. 10.12 which I shall come to shortly. The right to impose LAD even under cl. 42.1 is lost where the delay is occasioned by the defendant or by third parties. This has also been admitted by the defendant and as testified by DW1. That position is correct on the terms of the GCC.

- G [40] It is not in dispute that the defendant has paid the purchasers late delivery charges as mentioned. These charges fall within what is described in cl. 10.12 of the DA as "damages, expenses, liabilities, losses, claims or proceedings whatsoever whether arising at common law or by statute in respect thereof". There is no dispute or real dispute in this regard either.
- H There is also no dispute that cl. 10.12 creates an obligation on the plaintiff to indemnify the defendant.

- I [41] What, however, is in dispute is whether this obligation to indemnify the defendant for such late delivery charges is unconditional. The plaintiff maintains that the obligation does not arise or that the defendant is not so entitled because the defendant had extended the time for completion of the said project. Next, the defendant had agreed that no LAD would be imposed

when the extensions were granted. In any case, the defendant is the cause of the delay in completion in which case, the right to enforce this right was not available.

[42] In response, the defendant contended that the plaintiff never applied for any extensions of time to complete the said project. The plaintiff only applied for extensions under the GCC. When granting the extensions, the defendant had specifically reserved its right to impose LAD in the nature of these late delivery charges when it alerted the plaintiff as to certain amounts due under cl. 10.12. In any case, the plaintiff had undertaken to indemnify the defendant for such late delivery charges.

[43] This is what cl. 10.12 states:

10.12 LATE DELIVERY TO THE PURCHASERS

The Design and Build Contractor shall be liable to pay SPNB in respect of claims by the Purchasers arising from any delay in the completion and delivery of the Residential and/or Commercial Units to the Purchasers and shall indemnify and keep SPNB indemnified against any damages, expenses, liabilities, losses, claims or proceedings whatsoever whether arising at common law or by statute in respect thereof.

[44] The existence and validity of contracts or agreements on indemnity is recognised in s. 77 of the Contracts Act 1950 which states:

A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

[45] In *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295; [1992] 2 MLJ 355, the Supreme Court had occasion to distinguish a contract of indemnity from a contract of guarantee. At p. 299 (CLJ); p. 360 (MLJ), the Supreme Court explained:

We found in the first place that the difference between a contract of indemnity and a contract of guarantee appears to have been overlooked. A contract of indemnity is defined in s. 77 of our Contracts Act 1950 as 'a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person'. A contract of guarantee, according to s. 79 of the Contracts Act 1950 'is a contract to perform the promise, or discharge the liability, of a third person in case of his default'. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. In a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, as distinct from a contract of guarantee which is a collateral contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promise (see *Yeoman Credit Ltd v. Latter*).

A [46] In *Malayan Banking Bhd v. Basarudin Ahmad Khan* [2004] 4 CLJ 596; [2005] 1 MLJ 210, the Court of Appeal also had occasion to deal with the question of what a contract of indemnity is. At p. 605 (CLJ); p. 215 (MLJ), the court opined:

B [11] But a contract of indemnity is very different. By definition, it is a contract 'by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person'. See, s. 77 of the Contracts Act 1950. In consequence, a promisee in a contract of indemnity must prove that he or she has suffered loss before he or she may succeed. In other words, loss is an essential ingredient of the cause of action whereas it is not so in an action for breach of warranty.

C [47] The Court of Appeal's decision was reversed by the Federal Court. Still, it would appear that the Federal Court was nevertheless in agreement on this pronouncement of the general principles on a contract of indemnity.

D The Federal Court found the underlying contract to be one in the nature of a contract of employment with an indemnity clause added as an alternative remedy.

E [48] However, this right to damages for late completion is a separate and different ... from the payment of any damages for the late delivery of the units constructed under the project to the respective purchasers. That obligation which arises under cl. 10.12 of the DA is different from the damages mentioned under cl. 42 of the GCC. The payment under cl. 10.12 is more properly referred to as "late delivery charges" or payments although frequently referred to as LAD by house purchasers.

F [49] Therefore, the testimonies of the plaintiff's witnesses that the parties had discussed and agreed to the waiver or non-imposition of the LAD (as seen in letters exchanged between the parties, including the plaintiff's letter dated 15 October 2012, 28 December 2010, 25 April 2011, and 26 July 2011) meant that the parties had agreed or had also agreed or the late delivery charges mentioned in cl. 10.12, must be rejected. The "LAD" mentioned in those letters or meetings does not and cannot include those charges. The evidence shows the four of the parties at the material time was on the LAD calculated at the rate of RM15,306.53 per day provided under cl. 42.1 of the GCC.

G [50] The court must therefore reject the plaintiff's contention that there has been an agreement between the parties on the matter of late delivery charges liable to be paid to the house purchasers. As the evidence reveals and as will be seen later, the parties were still in discussion over this issue. In fact, the parties remained in discussion long after the completion of the project.

H The rejection of this argument of the plaintiff however does not mean that the defendant is entitled to the sum of RM1,987,836.09 which is presently retained by the defendant. For that, we now turn to the construction of cl. 10.12 of the DA.

I

[51] In the present case, the three underlying documents in this case, namely the DA, the GCC and the LOA must be read together. In fact, cl. 37 of the DA clearly provides for this, that all three documents are “to be read and treated as one and single document”:

37. ENTIRE AGREEMENT

37.1 This Agreement, Letter of Award and Contract Document, shall be read and treated as one and single document. In the event of any conflict between the terms of this Agreement and the terms contained in the Letter of Award and Contract Document, the terms of this Agreement shall prevail for the purpose of enforcement of this Agreement, unless otherwise specifically stated herein and/or otherwise mutually agreed by the Parties in writing. In the event of any ambiguity or inconsistency in the interpretation or construction of this Agreement such ambiguity or inconsistency shall be resolved in favour of SPNB.

[52] It is indisputable that the plaintiff did not apply for an extension of time under cl. 10.9 of the DA. It only applied for an extension of time (two applications in fact) under cl. 45. It is the plaintiff’s argument that the application under cl. 45 must be assumed to be an application under cl. 10.9. The plaintiff had compared the terms and has attempted to submit that the applications encompassed applications under cl. 10.9. That being the case, any extension under cl. 45 must therefore be an extension under cl. 10.9 of the DA. The plaintiff has also submitted that cl. 10.9 merely provides for a notification process; and that extensions of time under the DA are automatic.

[53] The court has examined these provisions very carefully and cautiously; and has come away with nary a suggestion of that understanding.

[54] What the court has found instead is that while there must be separate applications of time for extensions of the DA, the efforts and actions undertaken pursuant to the GCC cannot be ignored. It would be difficult for the court to say that the said project was completed for the purpose of the GCC; but not for the purpose of the DA simply by reference to the activity or action related to applications for extensions of time. The court appreciates that the DA was an agreement to develop the relevant plots of land while the GCC was the specific construction contract.

[55] From the terms of the DA, the parties had anticipated that the actual construction works may be executed by some other party or contractor chosen from a prescribed list found in appendix A to the DA. The DA however, anticipated that the construction may be carried out by the plaintiff itself and not some other contractor from the list in appendix A. Because the parties had provided that the three and various other documents are to be read together with the DA, it can only mean that the court must take into account the events under one agreement and its relation or impact on the other, if any. The effect, if any may be small; but no less it must be

- A recognised. Otherwise, the compartmentalising of the agreements and the meanings to be accorded to them would be artificial and impractical.
- [56] Having said that, it does not, however mean that the grants of extensions of time mean that the obligations under cl. 10.12 may no longer be invoked or be available. It depends.
- B [57] The evidence shows that the plaintiff's applications for extensions of time were made under the GCC and not the DA. That however, does not necessarily mean that the plaintiff is breach of the DA such as to disentitle the plaintiff to the present claim. In fact, when the plaintiff failed to complete
- C by the completion date, the defendant who could have terminated the DA, did not.
- [58] In cl. 20 of the DA, it is *inter alia* provided that in the event of a breach by the plaintiff, of any of its obligations under the DA, "then SPNB may without prejudice to any other rights or remedies which SPNB may have against the design and build contractor, give notice to the design and build contractor specifying the relevant breach and requiring the design and build contractor to remedy that breach within a period of thirty (30) days after the date of receipt of such notice failing which SPNB may thereupon terminate this agreement".
- D [59] The defendant did not exercise this right. Instead it chose to enforce its right to be indemnified under cl. 10.12.
- [60] By its conduct, the defendant must be taken to have agreed and accepted that the completion date of the DA has in fact and in reality been extended by virtue of the extension. Although the extension was made in the sense of the paper work and the formality to have been one under the GCC, for all intents and purpose, it was also under the DA. There cannot be an extension of the completion date for the purpose of the GCC; but none for the purpose of the DA. That distinction and separation is artificial, unreasonable and improper given that the parties have always intended the DA and the GCC (together with the LOA) to be read as a single document. The reading cannot be of any meaning or value if it is not carried into effect or application. Hence, that when the defendant agreed to extend time, the very fact that it alluded to cl. 10.12 indicates that the defendant was well-aware of the operation of the terms and conditions of the DA. The defendant's reference to cl. 10.12 of the DA infers that the term and conditions of the DA were also under consideration. That would and must include an extension of time under the DA. Hence, the defendant has in effect waived all rights to damages, including LAD.
- H [61] The defendant sought to rely on *inter alia* the two decisions of the apex court in support; namely *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; [2013] 1 MLJ 449 and *Sime Hok Sdn Bhd v. Soh Poh Sheng* [2013] 2 CLJ 615; [2013] 2 MLJ 149. In *Andrew Lee Siew Ling*, the Federal Court had opined that the promisor may still be liable even
- I

where the principal borrower could not have been made liable. In *Sime Hok Sdn Bhd v. Soh Poh Sheng* [2013] 2 CLJ 615; [2013] 2 MLJ 149, the Federal Court concluded that the defendant remained liable even if time was extended. Once a breach had occurred, it remained regardless of the extension.

[62] The important principle that one can draw from these cases as well as the earlier cases is that contracts of indemnity are not contracts of strict or absolute liability. The agreement or promise to pay or indemnify is not unconditional. It is conditional on the loss suffered and for which the indemnity is sought must be a loss which is caused to the promisee by the conduct of the promisor himself, or by the conduct of any other person. Implicit in this condition is that the loss suffered cannot be that which is caused by the promisee or the defendant. If that be the case, the right to be indemnified simply does not arise.

[63] On the present facts, the delay that led to the eventual loss was in the first place occasioned by the defendant itself who is now claiming or relying on the obligation to indemnify. In such a case, the rules of equity and even more of statute law as provided under s. 77 of the Contracts Act, do not allow for such a claim.

[64] Although the defendant is not here seeking to enforce its rights under the GCC and for damages for late completion, which it cannot in any case as it had waived specifically that right when it decided not to impose LAD, the defendant is seeking to enforce a specific right to be indemnified under the DA. In order to be so entitled, the defendant will have to prove that the loss for which it is claiming is not caused by its own conduct but by that of the plaintiff; or by some third party. It is only in those two circumstances that the defendant will be entitled to enforce its right of indemnity. To realise that right to be indemnified, the defendant has still to prove its claim. The fact of payment to the purchasers in late delivery charges is merely evidence of payment to some claims; the question of culpability or liability to pay must still be proved.

[65] I do not agree that all that the defendant needs to do is show payment. The defendant must still prove that there was delay in completion and that it did not cause that delay; or that the delay is in no way attributable to the defendant. For this purpose, the reasons for the delay are explained in the plaintiff's application for EOTs. Those reasons were accepted by the defendant and the defendant eventually caused the EOTs to be favourably granted.

[66] An examination of the relevant EOTs confirms this. The certificates of delay and EOT Nos. 1 and 2 are as follows:

**PERAKUAN KELAMBATAN DAN LANJUTAN MASA No. 1
(CERTIFICATE OF DELAY AND EXTENSION OF TIME No. 1)**

Rujukan : SPNB/RMM/SLGR/WAWAR/02/AP (023)

A **Pejabat:**
Syarikat Perumahan Negara Berhad
Tingkat 8, Wisma Perkeso
Jalan Tun Razak
50400 Kuala Lumpur

B Tarikh : 15 August 2012

Kepada CB Land Sdn Bhd
No. 28, Jalan SS 24/13, Taman Megah
47301 Petaling Jaya
Selangor Darul Ehsan
(Kontraktor)

C Kontrak No : **SPB/RMM/APS/SEL-S-ALAM/LA/2007**

Kontrak untuk : **CADANGAN PEMBANGUNAN PERUMAHAN
MAMPU MILIK DI ATAS SEBAHAGIAN LOT 13824
& 13825 SEKSYEN 22, SHAH ALAM, SELANGOR
DARUK EHSAN (ALAM PRIMA) - FASA 1**

D Bahagian*
Section* _____

Dengan ini saya memperakui bahawa kemajuan dan penyiapan Kerja-kerja/
I hereby certify that the progress and completion of the Works /

E ~~Bahagian kerja-Kerja*~~ seperti yang tersebut di atas ~~mungkin~~/telah * terlambat
~~Section of the Works* mentioned above is likely to be/has been* delayed beyond~~

melewati Tarikh Siap seperti yang dinyatakan dalam Lampiran kepada
Syarat-Syarat
the Date of Completion stated in the Appendix to the Conditions of Contract or

F Kontrak atau melewati Tarikh Lanjutan Siap yang telah dibenarkan
sebelum ini iaitu 5hb Ogos 2010
beyond the extended Date for Completion previously approved i.e 5th August 2010

dengan sebab / ~~sebab-sebab~~ berikut:
due to the following reason / **reasons** :

G	Bil.	Sebab / sebab-sebab (reason / reasons)	Klausa (Clause)	Lanjutan Hari (Period of Delay and Extension of Time)
H	1.	Additional authority's requirements and works on the R.O.W that requires submissions to JKR for approval	45.1(f)	227
I	2.	Delay of TNB bulk meter to energise power to the site	45.1(e)	
	JUMLAH KESELURUHAN			227

2. Menurut Klausa 45 Syarat-Syarat Kontrak, saya dengan ini membenarkan
In accordance with Clause 45 of the Conditions of Contract, I hereby grant

lanjutan masa selama 227 hari untuk menyiapkan Kerja-Kerja / ~~Bahagian Kerja-Kerja~~*
*you an extension of time of 227 days for the completion of the Works/ ~~Section of the Works~~**

A

di bawah Kontrak ini.
Under this Contract.

B

3. Berikutan dengan ini Tarikh Siap yang telah ditetapkan pada 5hb Ogos 2010

The Date for Completion which has been fixed on 5th August 2010

sekarang ini dilanjutkan kepada 21hb Mac 2011.
 is now therefore extended to 21st March 2011.

C

- sgd -
 Pengarah Projek
Project Director

Nama Penuh Dato' Dr Sr Kamarul Rashdan bin Salleh
Name in Full
 Nama Jawatan Pengarah Urusan
Designation Syarikat Perumahan Negara Berhad

D

Tandatangan Pegawai yang diwakilkan bertindak,
 untuk dan bagi pihak

SYARIKAT PERUMAHAN NEGARA BERHAD

Signature of Officer authorised to act for and on behalf of
SYARIKAT PERUMAHAN NEGARA BERHAD

E

* Potong jika tidak berkenaan
(Delete if not applicable)

^ Sebutkan rujukan Klausa yang mana Kontraktor berhak mendapat Lanjutan Masa

F

(State Clause reference by which the Contractor is entitled to extension of time)

< Sebutkan Tempoh Kelambatan dan Lanjutan Masa yang disokong (sama ada serentak atau berturut-turut)

(State Period of Delay and Extension of Time recommended (whether concurrently or consecutively))

G

PERAKUAN KELAMBATAN DAN LANJUTAN MASA No. 2
(CERTIFICATE OF DELAY AND EXTENSION OF TIME No. 2)

Rujukan : SPNB/RMM/SLGR/WAWAR/02/AP (037a)

Pejabat:

Syarikat Perumahan Negara Berhad
Tingkat 8, Wisma Perkeso
Jalan Tun Razak
50400 Kuala Lumpur

H

Tarikh : 15hb Oktober 2012

Kepada CB Land Sdn Bhd
 No. 28, Jalan SS 24/13, Taman Megah
 47301 Petaling Jaya
 Selangor Darul Ehsan
(Kontraktor)

I

A Kontrak No : **SPB/RMM/APS/SEL-S-ALAM/LA/2007**
Kontrak untuk : **CADANGAN PEMBANGUNAN PERUMAHAN MAMPU MILIK DI ATAS SEBAHAGIAN LOT 13824 & 13825 SEKSYEN 22, SHAH ALAM, SELANGOR DARUK EHSAN (ALAM PRIMA) - FASA 1**

B Bahagian*
Section* _____

Dengan ini saya memperakui bahawa kemajuan dan penyiapan Kerja-kerja/
I hereby certify that the progress and completion of the Works /

C ~~Bahagian Kerja-Kerja~~ * seperti yang tersebut di atas ~~mungkin~~/telah *
terlambat melewati

~~Section of the Works~~ * as mentioned above is ~~likely to be~~ / has been* delayed beyond

Tarikh Siap seperti yang dinyatakan dalam Lampiran kepada Syarat-Syarat
Kontrak atau

the Date of Completion stated in the Appendix to the Conditions of Contract or beyond

D melewati Tarikh Lanjutan Siap yang telah dibenarkan sebelum ini iaitu
21hb Mac 2011

the extended Date for Completion previously approved i.e 21st March 2011

dengan sebab / ~~sebab-sebab~~ berikut:

due to the following reason / reasons :

Bil.	ALASAN	KLAUSA	HARI
1.	'Permit Obtained From Land Office'	45.1(f)	} 423
2.	'R.O.W Works'	45.1(e)	
3.	'SYABAS 450mm pipe tapping'	45.1(f)	
4.	Additional requirement during++ CF Inspection & construction	45.1(f)	
5.	'Application for CF'	45.1(e)	
G	JUMLAH KESELURUHAN		423

2. Menurut Klausula 45.1 Syarat-Syarat Kontrak, saya dengan ini membenarkan
In accordance with Clause 45.1 of the Conditions of Contract, I hereby grant

lanjutan masa selama 423 hari untuk menyiapkan Kerja-Kerja / ~~Bahagian Kerja-Kerja~~* di bawah Kontrak ini.

H *you an extension of time of 423 days for the completion of the Works/ Section of the Works* under this Contract.*

3. Berikutan dengan ini Tarikh Siap yang telah ditetapkan pada ~~21hb Mac 2011~~

The Date for Completion which has been fixed on 21st March 2011

I sekarang ini dilanjutkan kepada 17hb Mei 2012.
is now therefore extended to 17th May 2012.

- sgd -

Pengarah Projek

Project Director

A

Nama Penuh Dato' Dr Sr Kamarul Rashdan bin Salleh
Name in Full

Nama Jawatan Pengarah Urusan

Designation Syarikat Perumahan Negara Berhad

B

Tandatangan Pegawai yang diwakilkan bertindak,
untuk dan bagi pihak

SYARIKAT PERUMAHAN NEGARA BERHAD

Signature of Officer authorised to act for and on behalf of

SYARIKAT PERUMAHAN NEGARA BERHAD

C

* Potong jika tidak berkenaan

(Delete if not applicable)

^ Sebutkan rujukan Klausa yang mana Kontraktor berhad mendapat Lanjutan Masa

(State Clause reference by which the Contractor is entitled to extension of time)

< Sebutkan Tempoh Kelambatan dan Lanjutan Masa yang disokong (sama ada serentak atau berturut-turut)

(State Period of Delay and Extension of Time recommended (whether concurrently or consecutively))

D

E

[67] It is evident from both the certificates issued that the plaintiff's application for extension of time were by reason of cls. 45.1(e) and (f) which have been set out earlier. Clauses 45.1(e) and (f) deal with delays by reason of "the contractor not having received in due time necessary instructions, decisions, information, concurrence or consent from P.D. which the P.D. is obliged to provide or give under the contract for which the contractor shall have specifically applied in writing on a date which having regard to the date for completion stated in appendix 1 or to any extension of time then fixed under this clause, was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for the contractor to receive the same, or by delay in receipt of any necessary permission or approval of any statutory body or local authority which the contractor has taken all practicable steps to avoid or reduce".

F

G

[68] It is clear from the certificates issued by the defendant that the reasons for the delay in completion were not occasioned by the plaintiff, but in fact by the defendant. This was in fact admitted by DW1. Even in the case where the delay was relation to the local authorities, the contractual provisions recognise and accept that where the plaintiff has done all that was practical on its part the extensions of time under cl. 45.1(e) and (f) may be granted. And, on the facts of this case, this is why the defendant granted the time extensions sought by the plaintiff. It is the court's findings and determination that the defendant cannot now turn round and rely on the indemnity promise.

H

I

- A [69] Given that both the extensions of time were by virtue of cls. 45.1(e) and (f), where in the case of (e) it refers to the defendant being in delay in respect of the necessary instructions, decisions and the like; and in the case of (f), it refers to the delay in receiving the necessary approvals and where the plaintiff had taken all practicable steps to avoid or reduce such delays;
B and more importantly, the defendant has accepted these reasons, it is not available to the defendant, in such circumstances, to enforce the right to be indemnified in cl. 10.12.

- C [70] Consequentially, the court is satisfied that the plaintiff has shown that the delay was not due to its fault or that it was in any way to blame. In such a case, the defendant is not entitled to invoke and enforce cl. 10.12 of the DA. This clause read with s. 77 of the Contracts Act 1950 was intended to apply where the plaintiff was at fault and not otherwise. If that were not the case, a defendant could simply delay delivery of possession to the purchasers for whatever reason even if the plaintiff had delivered by the original date
D of completion; and yet have to pay for such late delivery charges. As mentioned earlier, the DA must be read together with the GCC. Once read as a whole, it will be seen that the defendant's right to be indemnified is subject to the existence of a delay. Since time for completion has been extended, the right to be indemnified is no longer available. More so where
E the delay is caused by the defendant, the party who is now demanding to be indemnified.

- F [71] On a true interpretation of cl. 10.12 of the DA, the right to be indemnified is dependent on the plaintiff being the cause of the delay which led to the imposition and payment of the late delivery charges. The plaintiff is not the cause. The defendant is. The plaintiff is therefore not obliged to indemnify the defendant for the late delivery charges that the defendant has paid to the house purchasers.

Letter Of Undertaking

- G [72] Insofar as the letters are concerned, let me deal first with the matter of the plaintiff's allegation of duress.

- H [73] Although para. 7 of the reply and defence to the counterclaim pleaded that the letter of undertaking was signed under duress occasioned by the defendant calling on the performance bond, a great detail more was divulged during the trial. The defendant has taken the position that all this must be disregarded and the plea of duress rejected.

[74] The court agrees with the defendant that this allegation of duress is unsustainable from a point of plea.

- I [75] PW1 in evidence had elaborated and outlined the circumstances of the duress being this: by mid 2012, the plaintiff had in fact completed the works and the only outstanding issue between the parties was the matter of payment of RM4,599,864.80 under Penultimate Certificate No. 30 to the plaintiff.

In June, the parties are said to have agreed that that certificate would be paid in full without any deductions or imposition of LAD (p. 309). EOTs 1 and 2 were granted on 5 August 2012 and 15 October 2012 (pp. 310 - 320). With that, Penultimate Certificate No. 30 was presented for payment on 19 October 2012 (p. 321). The defendant, however, sought documents before payment would be made. On 30 November 2012, the defendant paid the plaintiff RM1,599,864.80 leaving a sum of RM3 million outstanding. At the same time of payment, the defendant made a call on the bond for the sum of RM3,260,091 and asked for a bank guarantee of RM1.9 million for LAD payments to the house purchasers (p. 348). At this point, the plaintiff who claimed to be “accumulating financial pressure brought about by the defendant’s non-payment” had no recourse but to choose the more practical and realistic option of acceding to the defendant’s demand to issue the letter of undertaking of 6 December 2012.

[76] The allegation of duress is a specific plea and it has the legal effect of negating consent or admission. That being the case, before that legal defence is available, the material facts and circumstances and how it operated or affected the plaintiff so as to negate or vitiate consent or admission must be specifically pleaded. Order 18 r. 12 of the Rules of Court 2012 require sufficient particulars to be provided. The court disagrees with learned counsel for the plaintiff that the plaintiff is not required to plead the requisite details. The court finds the plea of duress lacking in material particulars. All that the plaintiff has pleaded is to say that it was given under duress in relation to the payment of the penultimate certificate and the call on the bond.

[77] The court finds that para. 7 of the reply fails in this regard. As can be seen, PW1 has gone into substantial detail as to the circumstances of the duress which the court and the defendant is hearing for the first time when PW1 is testifying. In the circumstances, the plea of duress is rejected.

[78] Moving next to the letter(s) of undertaking, after having evaluated the correspondence carefully, the court does not find that there have been agreements which are unequivocal and of the meaning suggested by the defendant. These are the relevant letters exchanged between the parties and which are set out in full for ease of reference.

[79] By letter dated 10 September 2012, the defendant granted the first EOT to the plaintiff:

Rujukan Kami : SPNB/RMM/SLGR/WAWAR/02/AP (027)
Tarikh : 10 September 2012

CB Land Sdn. Bhd.
No. 28, Jalan SS 24/13
Taman Megah
47301 Petaling Jaya
Selangor

(U/p: YBhg Dato’ Paduka Ali Akbar B. Bahar)

- A YBhg Dato',
- CADANGAN PEMBANGUNAN PANGSAPURI KOS SEDERHANA
TINGGI DI ATAS SEBAHAGIAN LOT 13824 DAN 13825 UNTUK
FASA 1 DAN FASA 2 SEKSYEN 22, SHAH ALAM, MUKIM
DAMANSARA, DAERAH PETALING, SELANGOR DARUL EHSAN
(FASA 1)**
- B - *Lanjutan Tempoh Perlindungan Insurans dan Jaminan Bon Pelaksanaan*
- *Denda Lewat Serah Kepada Pembeli*
-
- C Dengan segala hormatnya perkara di atas dan surat awal kami ruj: SPNB/
RMM/SLGR/WAWAR/02/AP (025) bertarikh 15 Ogos 2012 adalah
dirujuk.
- Adalah dimaklumkan bahawa pihak YBhg. Dato' dikehendaki untuk
memperbaharui perlindungan insurans dan jaminan bank bagi Bon
Pelaksanaan Kerja berdasarkan tarikh Perakuan Kelambatan dan
Lanjutan Masa (EOT) No. 1 yang diluluskan melalui surat di atas.
- D Selain daripada itu, selaras dengan klausa 10.12 Perjanjian Pembangunan
(DA), ke semua kerosakan, perbelanjaan, tanggungan, kerugian, tuntutan
atau pampasan pihak pembeli yang terlibat akibat daripada kelewatan
pembangunan ini akan ditanggung sepenuhnya oleh pihak tuan. Oleh
yang demikian, anggaran jumlah terkumpul Denda Lewat Serah (LAD)
pemilikan kosong kepada pembeli yang perlu ditanggung oleh pihak
- E YBhg. Dato' sehingga tempoh EOT No. 1 berakhir adalah sebanyak
RM 56,797.82.
- Sekian, terima kasih.
- Yang benar,
- F **SYARIKAT PERUMAHAN NEGARA BERHAD**
- sgd -
DATO' DR. SR. KAMARUL RASHDAN BIN SALLEH
Pengarah Urusan
- G **[80]** In this letter, the extension is granted but clearly the defendant
reminds the plaintiff of the late delivery charges which at that time was a sum
of RM56,797.82. There is no acceptance by the plaintiff of this condition.
At best, the plaintiff is put on notice of such charges; and this is
acknowledged by the defendant in its submissions.
- H **[81]** Then comes the second extension. In response to this application, this
is the defendant's letter dated 15 October 2012:
- Rujukan Kami : SPNB/RMM/SLGR/WAWAR/02/AP (037)
Tarikh : 15 Oktober 2012
- I CB Land Sdn. Bhd.
No. 28, Jalan SS 24/13
Taman Megah
47301 Petaling Jaya
Selangor
(U/p: YBhg Dato' Paduka Ali Akbar B. Bahar)

YBhg Dato',

A

**CADANGAN PEMBANGUNAN PANGSAPURI KOS SEDERHANA
TINGGI DI ATAS SEBAHAGIAN LOT 13824 DAN 13825 UNTUK
FASA 1 DAN FASA 2 SEKSYEN 22, SHAH ALAM, MUKIM
DAMANSARA, DAERAH PETALING, SELANGOR DARUL EHSAN
(FASA 1)**

B

- Sijil Perakuan Kelambatan dan Lanjutan Masa No. 2

Dengan segala hormatnya perkara di atas adalah dirujuk.

Sukacita dimaklumkan bahawa permohonan Tempoh Lanjutan Masa (EOT) No. 2 telah diluluskan oleh pihak SPNB sehingga 17hb. Mei 2012 bagi pembangunan di atas.

C

Bersama-sama ini disertakan Sijil Perakuan Kelambatan dan Lanjutan Masa No. 2 untuk makluman dan rekod pihak YBhg Dato' serta sila pastikan perlindungan insurans dan jaminan bank bagi Bon Pelaksanaan kerja dilanjutkan berdasarkan kepada kelulusan EOT No. 2 di atas.

D

Selain daripada itu, selaras dengan klausa 10.12 Perjanjian Pembangunan (DA), ke semua kerosakan, perbelanjaan, tanggungan, kerugian, tuntutan atau pampasan pihak pembeli yang terlibat akibat daripada kelewatan pembangunan ini akan ditanggung sepenuhnya oleh pihak tuan. Oleh yang demikian, anggaran jumlah terkumpul Denda Lewat Serah (LAD) pemilikan kosong kepada pembeli yang perlu ditanggung oleh pihak YBhg. Dato' sehingga tarikh penyerahan sebenar adalah sebanyak RM1,987,836.09.

E

Sekian, terima kasih.

Yang benar,

SYARIKAT PERUMAHAN NEGARA BERHAD

F

- sgd -

DATO' DR. SR. KAMARUL RASHDAN BIN SALLEH

Pengarah Urusan

[82] Again, what may be said of this letter is that once more, the plaintiff is reminded and put to notice of the defendant's intention to claim indemnify under cl. 10.12 of the DA which by this time, the amount for late delivery charges had escalated to RM1,987,836.09.

G

[83] What follows next is the defendant's letter dated 30 November 2012. By this letter, the defendant paid the plaintiff a sum of RM1,599,864.80 pursuant to cl. 30(b) of the GCC:

H

Ruj. Kami : SPNB/LA55.RMM.AP.F1(SGOR)/NOV/2012/(1)

Tarikh : 30hb November 2012

CB LAND SDN. BHD.

No. 28, Jalan SS24/13

Taman Megah

47301 Petaling Jaya, Selangor

I

u.p. YBhg. DATO' PADUKA ALI AKBAR B. BAHAR

A Tuan,
Per: **CADANGAN PEMBANGUNAN PANGSAPURI KOS SEDERHANA
TINGGI DI ATAS SEBAHAGIAN LOT 13824 DAN 13825
UNTUK FASA 1 DAN FASA 2 SEKSYEN 22, SHAH ALAM,
MUKIM DAMANSARA, DAERAH PETALING, SELANGOR
DARUL EHSAN**
B - Bayaran 30(b) sebanyak RM1,599,864.80

Dengan segala hormat, perkara tersebut di atas adalah dirujuk.

C Bersama-sama ini dilampirkan cek kami CIMB Bank No. 450654 bertarikh
30 November 2012 sebanyak **RM1,599,864.80** bagi pembayaran tersebut di
atas.

D Seterusnya dimaklumkan bahawa pembayaran jumlah wang tersebut di
atas adalah dibuat oleh pihak SPNB kepada pihak tuan tanpa menjejaskan
hak dan kepentingan SPNB seperti yang dinyatakan di dalam surat SPNB
kepada pihak tuan terdahulu bertarikh 10 Februari 2012, peruntukan
klausa 10.12 di bawah Perjanjian Pembangunan (DA) dan juga klausa 48.1
di bawah Syarat-Syarat Kontrak.

Pihak tuan diminta menandatangani akuan terima surat ini seperti
dilampirkan.

E Sekian, terima kasih.

‘CEPAT, TEPAT, BERKAT’

Yang benar,
SYARIKAT PERUMAHAN NEGARA BERHAD
- sgd -

F **DATO’ DR. SR. KAMARUL RASHDAN BIN SALLEH**
Pengarah Urusan

G [84] As can be seen, and just as it had done previously, the defendant
reminds the plaintiff of its reservation of rights and interests under cl. 10.12
of the DA. The defendant requested the plaintiff to acknowledge by signing
on the attached acknowledgement. The plaintiff did so:

H Per: **CADANGAN PEMBANGUNAN PANGSAPURI KOS SEDERHANA
TINGGI DI ATAS SEBAHAGIAN LOT 13824 DAN 13825
UNTUK FASA 1 DAN FASA 2 SEKSYEN 22, SHAH ALAM,
MUKIM DAMANSARA, DAERAH PETALING, SELANGOR
DARUL EHSAN**
- Bayaran 30(b) sebanyak RM1,599,864.80

AKUAN PERSETUJUAN & PENERIMAAN

I Kami, **CB LAND SDN. BHD.** dengan ini bersetuju dan menerima
bayaran tersebut di atas daripada SYARIKAT PERUMAHAN NEGARA
BERHAD (SPNB) tertaklum kepada syarat yang ditetapkan di dalam surat
SPNB bertarikh 30.11.2012 (no. ruj. SPNB/LA/55.RMM.AP.F1(SGOR)/
NOV/ 2012/(1)) ini.

Tandatangan: sgd.....
 Bagi pihak CB LAND SDN. BHD.
 Nama: Za'Azlin Abd Maulid
 No. K/P: 620824-05-5135
 Jawatan: Pengurus
 Tarikh : 3/12/2012

A

B

[85] From the correspondence thus far, it would be fair to say that up to this point, there is actually no agreement by the plaintiff that it will or that it agrees to indemnify the defendant. Similarly, it would also be fair to say that there is no waiver of that right to be indemnified on the part of the defendant.

C

[86] This conclusion is fortified by the subsequent events. First, there were two meetings between the parties, and the ensuing correspondence. Were it otherwise, there would have been no need for the parties to meet or even to write on the matter again. But, the parties met. They first met on 4 December 2012. Two letters were subsequently issued, the contents of which make reference to that meeting. The first of the plaintiff's two letters on 6 December 2012 states:

D

Ruj. Kami : 338/BATU TIGA/AZL/12/1785
 Tarikh : 6hb Disember 2012

E

SYARIKAT PERUMAHAN NEGARA BERHAD

Tingkat 8, Wisma PERKESO
 Jalan Tun Razak
 50400 Kuala Lumpur

(U/P: YBhg. Dato' Dr. Sr. Kamarul Rashdan Bin Salleh)

F

YBhg. Dato',

**CADANGAN PEMBANGUNAN PANGSAPURI KOS SEDERHANA
 DI ATAS SEBAHAGIAN LOT 13824 DAN 13825 UNTUK FASA 1
 SEKSYEN 22, SHAH ALAM, MUKIM DAMANSARA, DAERAH
 PETALING, SELANGOR DARUL EHSAN (FASA 1)**

G

- Surat Akujanji Menanggung Rugi SPNB Ke atas Denda Lewat Serah (Liquidated & Ascertained Damages) di bawah Perjanjian Jual Beli di antara SPNB dan para Pembeli bagi Projek RMM SPNB Alam Prima

Merujuk kepada surat Syarikat Perumahan Negara Berhad (SPNB) (rujukan SPNB/LA/55.RMM.AP.F1(SGOR/NOV/2012/(1) dan (SPNB/RMM/SLGR/WAWAR/ 02/AP (054) masing-masing bertarikh 30hb November 2012, 3hb Disember 2012 dan perbincangan bersama pada 4hb Disember 2012.

H

2. Berdasarkan perbincangan yang telah diadakan baru-baru ini di antara kedua-dua pihak iaitu SPNB dan CB LAND SDN. BHD. mengenai menanggung rugi SPNB ke atas Denda Lewat Serah (Liquidated & Ascertained Damages) di bawah Perjanjian Jual Beli di antara SPNB dan para Pembeli bagi Projek RMM SPNB Alam Prima (Fasa 1),

I

3. Seterusnya dimaklumkan bahawa pihak kami akan hanya menanggung gantirugi tersebut setelah pihak SPNB mengemukakan butiran-butiran terperinci ke atas jumlah Tanggungan Rugi tersebut setelah ianya mematuhi kehendak sepertimana tertakluk di bawah Kontrak.

C

D [87] On the same day, the plaintiff issues a second letter. This second letter appears to follow yet another meeting on 6 December 2012. The letter reads:

E SYARIKAT PERUMAHAN NEGARA BERHAD

(U/P: Yang Berbahagia Dato' Dr. Sr. Kamarul Rashdan Bin Salleh)

F YBhg. Dato',

PEMBAYARAN SEMULA DENDA LEWAT SERAH KEPADA PEMBELI

Dengan segala hormatnya merujuk kepada surat dari pihak tuan bertarikh 3hb Disember 2012 No. Ruj: SPNB/RMM/SLGR/WAWAR/02/AP(054) dan perbincangan dengan pegawai tuan; Encik Hisham Ahmad, pada 6hb Disember 2012 mengenai perkara yang tersebut di atas.

H Sehubungan dengan itu, untuk menyelesaikan isu ini dicadangkan sedemikian:

Pembayaran Interim Penultimate Tertunggak	RM 3,000,000.00
Tolak	RM 1,987,836.09

Jumlah Perlu Dibayar Kepada CB Land RM 1,012,163.91

I Seterusnya, pihak SPNB perlu melampirkan secara terperinci kaedah yang digunapakai Pembayaran Semula Denda Lewat Serah kepada pembeli untuk pihak kami membuat penilaian ke atasnya.

Juga, pihak SPNB perlu menarik balik secara bertulis Tuntutan Bayaran Jaminan Bank untuk Bon Pelaksanaan kontrak kerja yang berjumlah RM3,260,091.00 kepada pihak bank dengan kadar segera.

A

Diharap perkara ini mendapat pertimbangan yang sewajarnya daripada YBhg. Dato demi kepentingan bersama.

Terima kasih.

B

Yang benar,

- sgd -

Authorise Signatory

[88] For the sake of completeness, this is the defendant's letter of 3 December 2012:

C

Ruj. Kami : SPNB/RMM/SGOR/WAWAR/02/AP (054)

Tarikh : 3hb Disember 2012

CB LAND SDN. BHD.

No. 28, Jalan SS24/13

Taman Megah

47301 Petaling Jaya, Selangor

(*u.p.* Ybhg. Dato' Paduka Ali Akbar B. Bahar)

D

Tuan,

Per: **CADANGAN PEMBANGUNAN PANGSAPURI KOS SEDERHANA TINGGI DI ATAS SEBAHAGIAN LOT 13824 DAN 13825 UNTUK FASA 1 DAN FASA 2 SEKSYEN 22, SHAH ALAM, MUKIM DAMANSARA, DAERAH PETALING, SELANGOR DARUL EHSAN (FASA 1)**

E

- Jaminan Bank Baharu Berjumlah RM1,434,104.57 Sebagai Bon Pelaksanaan Bagi Menggantikan Jaminan Bank Asal

F

- Jaminan Bank Berjumlah RM1,987,836.09 Sebagai Jaminan Pembayaran Semula Denda Lewat Serah Kepada Pembeli

Perkara di atas, surat kami no. rujukan SPNB/RMM/SLGR/WAWAR/02/ AP (045) bertarikh 27hb November 2012 dan perbincangan yang diadakan pada 3hb Disember 2012 berkenaan perkara di atas dengan segala hormatnya adalah dirujuk.

G

Berikut adalah perkara-perkara yang telah dibincang dan diputuskan oleh pihak pengurusan SPNB seperti senarai di bawah:

H

- (i) Pihak YBhg. Dato' perlu menyerahkan Jaminan Bank baharu sebagai Bon Pelaksanaan berjumlah RM1,434,104.57 yang merupakan 2.5% daripada nilai kontrak terkini dengan tempoh sah laku bermula dari 17hb Mei 2012 sehingga 30hb Ogos 2014 (24 bulan + 3 bulan + 14 hari)

I

A (ii) Pihak YBhg. Dato' juga perlu menyerahkan Jaminan Bank berjumlah RM1,987,836.09 sebagai Jaminan Pembayaran Semula Denda Lewat Serah kepada pembeli dengan tempoh sah laku sehingga pembayaran penuh dibuat kepada SPNB selaras dengan syarat-syarat di dalam Perjanjian Pembangunan.

B Pihak kami hanya akan menarik balik Tuntutan Bayaran Jaminan Bank untuk Bon Pelaksanaan kontrak kerja yang berjumlah RM3,260,091.00 kepada pihak bank setelah pihak YBhg. Dato' memenuhi segala keperluan di atas.

C Perhatian dan tindakan segera pihak YBhg. Dato' berhubung perkara ini amatlah dihargai.

Sekian, terima kasih.

Yang benar,

'CEPAT, TEPAT, BERKAT'

SYARIKAT PERUMAHAN NEGARA BERHAD

D - sgd -

WAN AZLAN BIN AB. RAHMAN

Ketua Jabatan

SPNB Rumah Mampu Milik

E [89] From this exchange of correspondence and the last two letters in particular, there is clearly no agreement on this matter of late delivery charges, whether the plaintiff would or would not be paying for these charges. It is obvious that in as much as the defendant had reminded the plaintiff of its obligation under cl. 10.12 of the DA; so had the plaintiff reserved its response under the relevant agreement each time its agreement was sought by the defendant.

F [90] Amongst the reservations or conditions that the plaintiff imposed was a requirement of the details of calculations of the late payment charges (see plaintiff's second letter of 6 December 2012); and that it will only indemnify upon provision of such details – see para. 3 of plaintiff's first letter of 6 December 2012. The trail of documentary contemporaneous evidence together with the numerous meetings between the parties show that the parties were in long discussions and negotiations with the plaintiff's penultimate payment and the payment of late delivery charges being central and recurring themes.

H [91] This trail shows quite clearly that contrary to the defendant's assertions, the parties had in fact, not reached any consensus on this matter of late payment or late delivery charges to the house purchasers. The plaintiff's responses were always guarded and not unequivocal.

I [92] In fact, there was no agreement. With that, there can be no admission, no reliance and no issue of estoppel. There is certainly no acknowledgement on the part of the plaintiff in the terms as suggested by the defendant.

Conclusion

[93] Under such circumstances, the plaintiff is entitled to its monies. The plaintiff's claim is accordingly allowed as in para. 13(a) of the statement of claim together with interest at the rate of 5% per annum from the date of judgment to the date of realisation; and the defendant's counterclaim is consequently dismissed. The court further orders the single costs of RM50,000. This sum was proposed by learned counsel for the defendant while learned counsel for the plaintiff had proposed the sum of RM70,000. The court agrees with the defendant that the sum of RM50,000 is suitable and reasonable costs and it is so ordered to be paid to the plaintiff.

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